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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

GUARDIANSHIP PETTITION NO.21 OF 2005

Girish J. Bobade ... Petitioner

v/s.

Ajay Thakur & Ors. ... Respondents

Mr.O.P. Pandey i/b Pandey & Co. for Petitioner
Mr.R.M. Kadam, Advocate General, for State
Ms.Swati Deshpande, Amicus Curiae

CORAM: **SMT.NISHITA MHATRE, J.**

DATED: **DECEMBER 22, 2005**

ORAL JUDGMENT:

. This Petition is filed under section 11 of the Guardians and Wards Act, 1890. The Petitioner is seeking guardianship of his minor daughters who are in the custody of their mother, the petitioner's wife. The question which has arisen in this petition is whether such petition is maintainable before this Court in view of the provisions of the Family Courts Act, 1984 and the judgment of the Full Bench of this Court in the case of *Romila Jaidev Shroff v/s. Jaidev Rajnikant Shroff,* **II (200) DMC 600 (FB).**

2. Since this is an important question of law which would affect several matters, I requested the learned Advocate General to address the Court. He has brought to my notice various provisions of law which have enabled me to deliver this judgment. Ms.Swati

Deshpande, who was appointed as amicus curiae has also rendered able assistance in the matter. I am grateful to both the learned Advocate General as well as Ms.Swati Deshpande for their valuable assistance in the matter.

3. The Petitioner has sought guardianship of the person and property of his minor daughters Divya and Priya. Respondent No.1 to the Petition is a family friend of the Petitioner. Respondent No.2 is the wife of the Petitioner. Respondent Nos.3 and 4 are the father and brother of Respondent No.2. According to the Petitioner, Respondent Nos.3 and 4 have abetted with Respondent No.1 and kidnapped his wife and his two minor daughters. In these circumstances, the Petitioner has sought guardianship of the person and property of the daughter Divya aged 13 years and daughter Priya aged 11 years. Admittedly, there is no pleading at all that there is any property in the name of the minors. Therefore, the Petition will have to be considered as one for guardianship of the person of the two children.

4. Section 7 of the Guardians and Wards Act, 1890 empowers the Court to appoint a guardian of a minor, of his person, or property, or both, or to declare a person to be such a guardian. The Court has to be satisfied that it is for the welfare of the minor that such an order is being passed. An order for being appointed as a guardian can be passed only when an application is made by the persons specified in section 8. Such an

application may be made by someone desirous of being appointed as a guardian or by any relative or friend of the minor. The Collector of the district or other local area within which the minor resides or in which he has property or the Collector having authority with respect to the class to which the minor belongs can also similarly file an application for guardianship.

5. Under section 9 if the application is made with respect to the guardianship of the person of a minor, it is to be made before the District Court having jurisdiction in the place where the minor ordinarily resides. If the application is made with respect to the guardianship of the property of the minor, it may be made either to the District Court having jurisdiction where the minor resides or where the property is situated.

6. Petitions filed under the Guardians and Wards Act in respect of the guardianship of the person and property of the minor are being entertained in this Court. However, with the advent of the Family Courts Act, 1984 on the Statute book, in my opinion, the petitions filed under the Guardians and Wards Act cannot be entertained in this Court if they are filed for appointment of a guardian of the person of a minor. For the purposes of Guardians and Wards Act, the term "District Court' as defined in section 4(4) includes the High Court in the exercise of its Ordinary Original

Civil Jurisdiction.

7. The Family Courts Act has been enacted in 1984 and came into force in the State of Maharashtra on 1.12.1986. The statement of objects and reasons of the Family Courts Act mentions that the legislature felt that there was a need, in the public interest, to establish family Courts for speedy settlement of family disputes. The legislature was of the opinion that rather than an adversary approach which prevails in civil matters, it was necessary to adopt a conciliatory procedure for settling family disputes.

8. The preamble of the Family Courts Act reads as under:

> "An Act to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith.

9. Chapter III specifies the jurisdiction of the Family Court. The jurisdiction ascribed to the Family Court is spelt out in section 7 of the Family Courts Act. The Family Court is empowered to exercise all the jurisdiction which is vested with the District Court or any subordinate civil Court in respect of the suits and proceedings stipulated in the explanation to the

section. The Family Court is deemed to be a District Court for the area to which the jurisdiction of the Family Court extends. The explanation to section 7 stipulates the kind of suits and proceedings over which the family Court would have jurisdiction. One of the categories of suits enumerated is those relating to guardianship & custody of minors. Clause (g) of the Explanation to section 7 reads as under:

> (g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

Section 8 of the Act excludes the jurisdiction of any other District Court.

10. The Full Bench of this Court in the case of *Romila Jaidev Shroff* (supra), has held that in view of the provisions of the Family Courts Act, the High Court exercising its Ordinary Original Civil Jurisdiction relating to matters under the Family Courts Act would be a District Court. The Full Bench held that under section 20 of the Family Courts Act, the Act has an overriding effect, notwithstanding anything inconsistent contained in any other law. The Full Bench considered the provisions of the Letters Patent and concluded that when the High Court exercises its Ordinary Original Civil Jurisdiction in relation to the matters under the Family Courts Act, it would be considered as a District Court. It would therefore lose its jurisdiction to the

Family Court. The Full Bench has considered the judgment of Madras High Court in the case of *Mary Thomas v/s. Dr.K.E. Thomas,* **AIR 1990 MADRAS 100** which has taken a contrary view. The Madras High Court has held that the Original Jurisdiction of the High Court in respect of the matters that may fall under the explanation to section 7 of the Act is not ousted. The High Court can continue to exercise its jurisdiction, notwithstanding the coming into force of the Family Courts Act. The Division Bench of the Karnataka High Court in the case of *Ashraya & Ors. v/s. etc.etc.,* **AIR 1991 KARNATAKA 10,** has on the other hand held that the proceedings instituted by foreigners for being appointed guardians of destitute children with an object of taking the child out of India in order to adopt the child, are proceedings falling within clause (g) of the Explanation to section 7. However, in this petition, it is not necessary for me to decide the issue as to whether "foreign adoptions" would be maintainable before this Court or the family Court.

11. The judgment of the Full Bench leaves no room for doubt that the High Court must be considered as a District Court for the purposes of the Family Courts Act and since the Family Courts have been established in the city of Mumbai, a Guardianship Petition for the custody or access to any minor would lie in the Family Court. The Guardians and Wards Act was enacted in 1890 and the High Court exercising its ordinary original civil

jurisdiction is considered a District Court under that Act. The High Court's jurisdiction has been ousted in the light of the provisions of the Family Courts Act in case of guardianship proceedings instituted by a relative of a minor for guardianship of the minor's person. Such a proceeding clearly falls within the purview of section 7 of the Family Courts Act. Therefore, only the Family Court would have jurisdiction in view of the provisions of section 20. By virtue of section 20, the Family Courts Act has an overriding effect over any other law. However, the High Court will continue to exercise its ordinary original civil jurisdiction in respect of petitions relating to the guardianship of the property of a minor.

12. In my opinion, therefore, a Guardianship Petition seeking guardianship of the person of a minor filed by either the parents or any relative of a minor would lie before the Family Court, irrespective of whether there is a matrimonial dispute pending before that Court. The Petition in the instant case, therefore, is not maintainable before this Court exercising its Ordinary Original Civil Jurisdiction and is accordingly, returned to the Petitioner for presenting the same before the appropriate Court.